Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Developing a Unified Intercarrier Compensation Regime	)	CC Docket No. 01-92
	)	
	)	

REPLY COMMENTS OF XO COMMUNICATIONS, INC. IN RESPONSE TO THE FURTHER NOTICE OF PROPOSED RULEMAKING

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EXECUTIVE SUMMARY

Although there is widespread agreement that the current intercarrier compensation system is in need of reform, the comments clearly show that bill-and-keep is not the solution. Statutory analyses provided in the initial comments emphasize that a bill-and-keep regime is not legally sustainable because it does not provide for "recovery of costs" as required by the Telecommunications Act of 1996 ("Act"). Additionally, while above-cost rates arguably found in the current intercarrier compensation system may create arbitrage incentives, the remedy is not to swing 180 degrees and mandate no compensation for transport and termination of traffic. Such a radical turn-around merely shifts the incentive in the opposite direction. Because traffic imbalance is the natural state of the current telecom industry and carriers incur real costs of network operation, bill-and-keep is not an appropriate intercarrier compensation mechanism. Regardless of whether these costs are traffic sensitive or not, carriers must be able to receive compensation for the costs of using their network. The Act requires it, and the Commission rules should mandate it as well.

Furthermore, Intercarrier Cost Forum ("ICF") proponents would have the Commission erroneously believe that the plan is preferable because it appears widely supported by all industry segments. The Commission, however, should be mindful of the vast number of parties that do *not* support that plan. Just because the ICF may include one or more participants from several industry segments does not signify that the plan is a "consensus" proposal. To the contrary, substantial opposition to the ICF proposal exists in virtually all segments of the industry, and none of the state commissions participating in this proceeding supports a mandatory bill-and-keep regime.

Several commenters propose changing long-standing interconnection rules in favor of requiring CLECs to establish additional points of interconnection ("POIs"), even where such POIs are not necessary or efficient from a network architecture perspective. Based on the widespread opposition to this proposal throughout the industry, however, the Commission should reject the proposal. If the Commission adopts an intercarrier compensation plan with cost-based rates, network modifications will not be necessary to address perceived problems raised by the ICF proponents. The Commission should reaffirm its commitment to establishing intercarrier compensation mechanisms that are consistent with the use of a single point of interconnection in a local access and transport area ("LATA") and with an incumbent local exchange carrier's ("ILEC's") obligation to provide transiting service at total element long run incremental cost ("TELRIC") rates.

XO acknowledges that in some cases, establishing additional POIs is preferable when traffic volumes reach a certain threshold; however, that notion is a far cry from the ICF proposal where additional POIs are required at each ILEC access tandem regardless of traffic volume and regardless of efficiency and cost considerations. Where traffic levels warrant additional

POIs, XO is not opposed to establishing them on a case-by-case basis through voluntary agreement with another carrier; however, competitive carriers are opposed to the Commission mandating additional POIs that lead to inefficient network architecture and burdensome costs.

XO opposes any proposal to price transit services at so-called market-based rates similar to special access services or to potentially subject them to pricing flexibility. Transit traffic is a fundamental part of an ILEC's interconnection obligation and should be exchanged between carriers under a unified intercarrier compensation scheme. As the Commission notes, the ILEC is often the only carrier that is interconnected with all other carriers, thus no competitive market exists for these services. While it may be true that at a certain level of traffic, direct interconnection between carriers would be more cost efficient than having the ILEC provide transit service, this does not warrant removal of transit services from the interconnection arena altogether. Establishing cost-based rates would set the correct price signals and would encourage direct connections when appropriate. When the level of traffic exchanged reaches a point where carriers find it efficient to directly interconnect, they would do so.

XO agrees that the Commission has clear jurisdiction over interstate services under section 201 and over reciprocal compensation under section 252(d)(2), but XO questions the Commission's authority to preempt state authority over intrastate switched access charges where state commissions have historically had exclusive jurisdiction. Rather than taking on the states as an adversary, the Commission should work with states to establish a unified system without preempting state decisions. XO supports referral of the issue of overhauling the intrastate switched access regime to a Federal-State Joint Board pursuant to section 410(c) of the Act or adoption of NARUC's proposal to allow states to voluntarily opt in to the federal regime.

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XO Communications, Inc. ("XO"), by its attorneys, hereby submits these Reply Comments in response to the Commission's Further Notice of Proposed Rulemaking to replace the current intercarrier compensation mechanisms with a unified regime.[1]

I. INTRODUCTION

As the Commission and most commenters stressed, the current system of intercarrier compensation is badly in need of revision. The piecemeal development of this system has in many instances created rates that are not cost-based and has distorted incentives for identifying and routing traffic. Although there is widespread agreement that the current intercarrier compensation system is in need of reform, the initial comments clearly show that bill-and-keep is not the solution. Furthermore, there is no justifiable argument that the current Calling Party Network Pays ("CPNP") framework is the underlying cause of the distortions in the

1 *Developing a Unified Intercarrier Compensation Regime*, Further Notice of Proposed Rulemaking, FCC 05-33, CC Docket 01-92 (rel. Mar. 3, 2005) (*FNPRM*).

industry today. CPNP is the best means of assuring that carriers are compensated for the use of their networks.

The initial comments provide persuasive evidence that the Commission should maintain the current CPNP framework and establish cost-based rates for all forms of traffic. Additionally, the Commission must not make unnecessary modifications to its interconnection rules that would result in burdensome costs for competitors. Rather, the Commission should affirm that competitive local exchange carriers ("CLECs") need only establish one point of interconnection in each local access and transport area ("LATA") and that incumbent local exchange carriers ("ILECs") must provide transit service at TELRIC-based rates. In reforming the intercarrier compensation system, the Commission should respect state jurisdiction over intrastate access service and avoid blanket preemption of state authority. By working cooperatively with the states, a unified system may be developed to include cost-based rates for those services.

II. MANDATORY BILL AND KEEP IS UNLAWFUL AND WILL NOT ACHIEVE THE RESULTS PROPONENTS CLAIM

The proponents of bill-and-keep argue that it would resolve all the faults with the current intercarrier compensation system;[2] however, XO, joined by a substantial cross-section of commenters, disagrees and maintains that the proper intercarrier compensation regime should include cost-based rates, not a compensation rate of zero.

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[2] SBC Comments at 9-12; ICF Comments at 20-37; Qwest Comments at 19-22 (supporting Qwest's own bill-and-keep plan, not the ICF plan).

XO included a statutory analysis in its initial comments, emphasizing that a bill-and-keep regime is not legally sustainable.[3] This analysis was echoed by other commenters,[4] who also maintained that because carriers incur non *de minimis* costs in terminating traffic, bill-and-keep arrangements that lack any provisions for compensation do not provide for "recovery of costs" as required by the Telecommunications Act of 1996 ("Act"). As the Commission noted in the *FNPRM*, any proposal that does not support a TELRIC standard would require some departure from the Commission's implementation of the section 252(d)(2) "additional cost" standard.[5] The Commission has previously concluded that state commissions could mandate bill and keep for section 251(b)(5) traffic only if two conditions are satisfied: (1) neither carrier has rebutted the presumption of symmetrical rates, and (2) the volume of terminating traffic is approximately equal and is expected to remain equal in the future.[6]

Contrary to the claims of Intercarrier Compensation Forum ("ICF") proponents,[7] the Commission did not rule out mandatory bill and keep simply "as a matter of policy." A unified mandatory bill-and-keep regime does not provide for

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3 XO Comments at 13-16.

4 KMC Telecom and Xpedius Communications Comments at 53-55; PAC-WEST, et al Comments at 9-15; Time Warner Telecom, et al. Comments at 19-25.

5 *FNPRM* ¶ 65.

6 *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996,* First Report and Order, 11 FCC Rcd 15499, ¶ 1111 (1996).

7 ICF Comments at 44-47.

the "mutual and reciprocal recovery" of costs required by section 252(d)(2). For the ICF to suggest that recovery *from end users* satisfies this standard misreads the statute. Section 252(d)(2) requires mutual and reciprocal compensation from the carriers exchanging traffic, not from end users. As the Public Utilities Commission of Ohio correctly points out, "any unified compensation regime that does not allow for mutual and reciprocal recovery by each carrier for its cost on the basis of "addition costs" of terminating a call is not consistent with Section 252(d)(2) requirements, especially where the exchange of traffic is not balanced between the carriers."[8] As XO indicated in its comments, intercarrier compensation rates should be cost-based, and bill-and-keep arrangements should be permitted only if voluntary or if the traffic is in balance.[9]

Furthermore, the ICF's reliance on a so-called "bill and keep savings clause" is incorrect.[10] As XO explained in its initial comments, this statutory provision supports the opposite claim – that bill and keep is permissible only as a voluntary arrangement between carriers.[11] The Commission cannot require parties to "waive" recovery; only the parties can voluntarily waive section 252(d)(2)'s requirement of mutual and reciprocal recovery.

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8 Ohio PUC Comments at 18.

9 XO Comments at 15.

10 ICF Comments at 45. The ICF refers to section 252(d)(2)(B)(i), which states that section 252(d)(2)(B) may not be construed "to preclude arrangements that afford the mutual recovery of costs through the offsetting of reciprocal obligations, including arrangements that waive mutual recovery (such as bill-and-keep arrangements)."

11 XO Comments at 15.

The ICF argues that the D.C. Circuit endorsed bill-and-keep in reviewing the Commission's *ISP Remand Order*[12] by noting the "non-trivial likelihood that the Commission has authority to elect" a bill-and-keep regime for section 251(b)(5) traffic.[13] To begin with, the language cited is not a finding by the court of the Commission's authority to adopt a bill-and-keep regime. In addition, the ICF failed to cite in its comments the court's following parenthetical suggesting the Commission might find authority for adopting bill-and-keep "(*perhaps* under §§ 251(b)(5) and 252(d)(B)(i))."[14] Such language is not an endorsement of the Commission's statutory authority to adopt bill-and-keep, as the ICF would have the Commission believe, but is mere speculation. Moreover, contrary to the ICF's assertion that the court supported the Commission's authority under section 252(d)(2)(B)(i), the court specifically stated that it was *not* deciding whether the Commission may adopt bill-and-keep for ISP-bound calls pursuant to section 251(b)(5).[15] In fact, the D.C. Circuit made no findings related to the Commission's authority under sections 252(d)(2) or 251(b)(5). Indeed, the court listed the various determinations that it was *not* making and limited its decision to finding that the Commission could not, pursuant to section 251(g), eliminate ISP-bound traffic from the requirements of section 251(b)(5). Thus, the language cited by the ICF is merely

12 *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Intercarrier Compensation for ISP-Bound Traffic*, Order on Remand, 16 FCC Rcd 9151 (2001) ("*ISP Remand Order*").

13 ICF Comments at 46 (citing *WorldCom, Inc. v. FCC*, 288 F.3d 429, 434 (D.C. Cir. 2002)).

14 *Id.* (emphasis added).

15 *WorldCom,* 288 F.3d at 434.

dicta that provides no confirmation of the court's position nor support for the Commission's authority to adopt a bill-and-keep regime under the statute.

None of the state commissions participating in this proceeding supports a mandatory bill-and-keep regime. The National Association of Regulatory Utilities Commissioners ("NARUC") supports intercarrier compensation rates that are competitively and technologically neutral and reflect underlying economic costs.[16] The Indiana Utility Regulatory Commission ecognizes that it is appropriate for a LEC to charge other carriers non-zero intercarrier compensation rates because those carriers are customers of the LEC and receive services of value from the LEC.[17] The Missouri Public Service Commission supports a unified intercarrier compensation regime that is based on forward-looking economic costs.[18] The New Jersey Board of Public Utilities supports the NARUC principles calling for a unified, cost-based rate, not bill-and-keep.[19] The Nebraska Public Service Commission supports a plan designed to allow carriers to recover an appropriate portion of its applicable network costs so that telecommunications providers have an opportunity to earn a reasonable return and can maintain a high quality of

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16 Ex parte letter from NARUC to FCC Chairman Kevin Martin (filed May 18, 2005), *Appendix B:* The National Association Of Regulatory Utility Commissioners Study Committee On Intercarrier Compensation Goals For A New Intercarrier Compensation System at 6 (May 5, 2004) ("*NARUC Task Force Study*").

17 Indiana URC Comments at 6.

18 Missouri PSC Comments at 3.

19 NJ Board of Public Utilities Comments at 3.

service.[20] Over the course of many years, these state commissions have had the opportunity to gather evidence from a wide variety of interested parties and analyze intercarrier compensation issues in-depth. The Commission should give substantial weight to their analysis.

Despite the legal issues, proponents claim that bill-and-keep will have several advantages over cost-based compensation. First, they claim bill-and-keep achieves the Commission's goals in reforming the current system:[21] promoting competition, facilitating efficiency, preserving universal service, ensuring competitive and technology neutrality, gaining administrative simplicity, and minimizing arbitrage opportunities.[22] XO supports these goals and agrees that any unified intercarrier compensation system should be simple and inexpensive to administer. There may be a perception that a bill-and-keep regime is a simple solution because it eliminates the need for carriers to exchange traffic data and pay compensation. However, the Commission's role is not to choose the plan that may be the easiest to implement--it must select the plan that most properly remedies all of the faults of the current system of intercarrier compensation, which bill-and-keep cannot do. Moreover, bill and keep is not the deregulatory solution some profess.[23] As the Indiana Commission aptly notes that bill-and-keep requires regulatory intervention for its very existence because it will continue to distort carriers'

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[20] Nebraska PSC Comments at 6.

[21] ICF Comments at 20; Qwest Comments at 19; SBC Comments at 4.

[22] *FNPRM* ¶ 29-33, 61.

[23] SBC Comments at 3.

decision-making criteria.[24] Thus, bill-and-keep is not a quick and easy solution, and it certainly is not the most fair or reasonable one. Bill-and-keep creates improper incentives for arbitrage and distorts efficient market structures, which is the very behavior that a new intercarrier compensation system should try to avoid.[25]

Second, SBC refers to the ICF as a "rare display of industry unity" and would have the Commission erroneously believe that the plan is preferable because it appears widely supported by all industry segments.[26] The Commission, however, should be mindful of the vast number of parties that do *not* support that plan. Just because the ICF may include one or more participants from several industry segments does not signify that the plan is a "consensus" proposal. To the contrary, substantial opposition to the ICF proposal exists in virtually all segments of the industry. For example, even the large ILECs are not unified in their support of the plan. Verizon opposes bill-and-keep, stressing that it would "encourage a whole new host of arbitrage opportunities" whereas "positive rates reflect the market outcome that one network is compensated."[27] Also, rather than supporting the ICF plan, BellSouth has instead proposed its own plan, which is intended to compensate a terminating carrier and does not include a bill-and-keep component. BellSouth correctly emphasizes that bill-and-keep would not promote economic efficiency or

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[24] Indiana URC Comments at 7.

[25] *Id.* at 8.

[26] SBC Comments at 1.

[27] Verizon Comments at 4.

promote universal service, nor is it competitively neutral.[28] While XO may not support all of the details of BellSouth's plan, XO agrees with BellSouth's rationale that "the new rules must properly compensate network providers."[29]

Additionally, although the ICF includes minimal CLEC and rural ILEC involvement, the plan received substantial opposition from CLEC and rural ILEC interests. In fact, the majority of the CLEC industry, including XO, Time Warner Telecom, PAC-WEST, KMC and Xspedius, oppose bill-and-keep.[30] Similarly, the Rural Alliance – a coalition of rural incumbent LECs – opposes mandatory bill and keep, and favors a unified cost-based rate instead.[31] The Alliance's concerns are echoed by state commissions with substantial rural interests, who note that bill and keep may be appropriate for carriers exchanging similar volumes of traffic, but that such circumstances do not exist with many rural carriers.[32] The South Dakota Public Utilities Commission argues that bill and keep does not work when dealing with rural networks which are more costly and present unbalanced traffic patterns.[33] XO urges the Commission not to be misled by the misperception of consensus over the ICF plan merely because multiple industry segments appear to

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28 BellSouth Comments at 9.

29 *Id.* at 4.

30 *See* KMC Telecom and Xspedius Communications Comments at 4; PAC-WEST, et al Comments at 13; Time Warner Telecom, et al. Comments at 9; CenturyTel Comments at 32; NTCA Comments at 17; Frontier Communications Comments at 4;

31 Rural Alliance Comments at 25.

32 North Dakota PSC Comments at 2.

33 South Dakota PUC Comments at 5.

be represented. Indeed, there is no consensus that bill-and-keep is either legally sustainable or the preferred plan of reform. To the contrary, there is widespread support on the record for a unified system comprised of cost-based rates for the exchange of all forms of traffic.

Third, bill and keep proponents like SBC argue that a bill and keep system would remove alleged incentives to "overcharge" for transport and termination. SBC claims that the current system creates incentives for a terminating carrier to overcharge the originating carrier and argues that bill-and-keep would eliminate this problem.[34] However, the solution to any overcharging is to transition compensation rates to a uniform cost-based rate. Bill-and-keep is a chainsaw when a scalpel is needed.

Thus, while above-cost rates arguably found in the current intercarrier compensation system may create arbitrage incentives, the remedy is not to swing 180 degrees and mandate no compensation for transport and termination of traffic. Such a radical turn-around merely shifts the incentive in the opposite direction. As the Ohio commission notes, bill and keep presents its own "gaming" problem:

> Under a bill-and-keep regime, carriers would attempt to game the system by shifting the cost of transporting traffic to providers of other networks while minimizing investment on their respective network. By contrast, if network providers can be assured cost recovery for carrying traffic, an incentive for building, upgrading and maintaining their networks, whether rural or urban, would exist. The benefits of such investment ultimately flow to all consumers of all network providers regardless of technologies used.[35]

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[34] SBC Comments at 2.

[35] Ohio PUC Comments at 17-18.

Furthermore, as the Indiana commission aptly states, "[a] government mandate to implement bill-and-keep would not make the pricing signals more accurate; it would simply make them incorrect government-mandated price signals."[36] The result could be a whole new incarnation of the spam epidemic. "If a bill-and-keep approach with an origination charge of zero were adopted," the Indiana commission points out, "there would be little in the way of technology and nothing in the way of pricing incentives to discourage unsolicited, unwanted IP-based spam or other messages."[37] This is precisely why the only appropriate intercarrier compensation regime must include TELRIC-based rates. With cost-based rates applied, each carrier must pay its own costs, either through use of its own network or through payments to another carrier for use of that carrier's network.

As the Commission noted in the *FNPRM*, while there is strong evidence that the current system is flawed, there is no justifiable argument that the flaws are due to a systemic failure in the CPNP system per se.[38] More likely, these flaws arose in conjunction with departures from cost-based rates rather than with the CPNP approach itself. XO agrees with the Ohio Commission that a CPNP regime more appropriately assigns costs directly to the decision-maker than a bill-and-keep

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36 Indiana URC Comments at 7.

37 *Id.* at 6.

38 *FNPRM* ¶ 38.

regime would.[39] Thus, the Commission should maintain the current CPNP approach by "allocat[ing] a share of the costs of terminating incoming traffic to intercarrier charges that fairly reflects the value of interconnection to the whole network."[40] Because traffic imbalance is the natural state of the current telecom industry[41] and carriers incur costs of network operation that are real and not *de minimus,* bill-and-keep is not an appropriate intercarrier compensation mechanism. Regardless of whether these costs are traffic sensitive or not, carriers must be able to receive compensation for the costs of using their network. The Act requires it, and the Commission rules should mandate it as well.

III. THE COMMISSION SHOULD NOT MODIFY THE EXISTING NETWORK INTERCONNECTION ARCHITECTURE RULES

If the Commission adopts an intercarrier compensation plan with cost-based rates, network modifications will not be necessary to address perceived problems raised by the ICF proponents. The Commission should reaffirm its commitment to establishing intercarrier compensation mechanisms that are consistent with the use of a single point of interconnection in a LATA and with an ILEC's obligation to provide transiting service at TELRIC rates, as described below.

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39 Ohio PUC Comments at 17.

40 Maine PUC and Vermont PSB Comments at 3.

41 Missouri PSC Comments at 23.

A. The Commission Should Not Adopt the ICF "Edge" Proposal, Which Would Require CLECs to Establish Additional Points of Interconnection in a LATA.

Federal law, including the Act and Commission rules, is unambiguous that a CLEC is required to establish only one point of interconnection ("POI") within the LATA for the exchange of all traffic between its and the ILEC's networks.[42] Further, the Commission has been clear that each carrier is required to "bear its own cost of delivering its originating traffic to the point of interconnection designated by the competitive LEC."[43] Several commenters propose changing these long-standing rules in favor of requiring CLECs to establish additional POIs, even where such POIs are not necessary or efficient from a network architecture perspective. Based on the widespread opposition to this proposal throughout the industry, the Commission should reject the proposal.

The ILEC proponents are not concerned with the efficiency of CLEC networks but rather prefer to dictate higher costs for their competitors. The ICF plan would require carriers to bear the cost of transporting traffic to the "edge" of an ILEC's network, which is defined as each access tandem that an ILEC deploys, even where there are multiple tandems in a LATA. In short, CLECs would be required to interconnect with the ILEC (at least from a financial perspective) at multiple points in a LATA, dictated by the ILEC's legacy network architecture, not technical

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[42] *See* 47 U.S.C. § 251(c)(2); *In re Petition of AT&T Communications of Virginia Inc., Pursuant to Section 252(e)(5) of the Communications Act for Preemption of the Jurisdiction of the Virginia Corporation Commission Regarding Interconnection*, 17 FCC Rcd 27039 (2002) ("*FCC Virginia Arbitration Order*").

[43] *FCC Virginia Arbitration Order* ¶ 53.

feasibility. This proposal would force CLECs to incur unreasonable costs to re-deploy the ILECs' inefficient network. After reviewing this concept in its state proceeding, the Ohio PUC has recognized that existing interconnection requirements allow efficient interconnection arrangements without the need to duplicate the incumbent LEC network and that the adoption of the ICF "Edge" concept would require the construction of additional, and, possibly, unneeded interconnection facilities by all carriers.[44] As CLECs are the carriers building networks based on the most current technology, imposing this new system on them would be equivalent to forcing them to operate with the same inefficiency of the ILEC embedded network to the detriment of competition and ultimately the public interest.

The Commission acknowledges that its "current rules may encourage traffic imbalances because terminating networks not only collect reciprocal compensation, they also avoid financial responsibility for transport facilities. When traffic is out of balance, the cost of interconnection is borne primarily by the originating carrier, and the terminating carrier may lack the incentive to minimize the transport costs associated with connecting the two networks."[45] However, the solution to this problem is not to modify the network architecture rules to encourage more inefficiency, but instead to reform the compensation rate. If the compensation rate reflects the costs of providing transport and terminating services, it will compensate carriers only for those costs. When terminating carriers are not overcompensated

44 Ohio PUC Comments at 14-15.

45 *FNPRM* ¶ 91.

for the use of their networks, there is no incentive for creating artificial traffic imbalances.

The Commission sought comment on whether changing its pricing methodology for reciprocal compensation would affect the incentives of competitive carriers to establish multiple POIs.[46] XO acknowledges that in some cases, establishing additional POIs is preferable when traffic volumes reach a certain threshold; however, that notion is a far cry from the ICF proposal where additional POIs are required at each ILEC access tandem regardless of traffic volume and regardless of efficiency and cost considerations. Instead, as XO and other commenters stressed, "carriers/network providers should retain the ability to negotiate a mutually agreed upon location of the POI as well as other details regarding the establishment of interconnection facilities."[47] Where traffic levels warrant additional POIs, XO is not opposed to establishing them on a case by case basis through voluntary agreement with another carrier; however, competitive carriers are opposed to the Commission mandating additional POIs that lead to inefficient network architecture and burdensome costs.

Finally, the Commission should maintain the current rules for the sake of clarity and consistency. As the Commission repeatedly has stressed, carriers need clear rules and regulatory certainty to conduct their business,[48] and principles of

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46 *Id.* ¶ 96.

47 Ohio PUC Comments at 14.

48 *FNPRM* ¶ 34. *See also Unbundled Access to Network Elements; Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Order on Remand, WC Docket No. 04-313, CC Docket No. 01-338, ¶

fairness dictate that the Commission maintain the system on which competitive carriers have relied in deploying their networks. The Part 51 interconnection rules have been in place for nine years, and parties have made substantial investments in interconnection architectures based on these rules. It would be wholly unwarranted and unreasonable at this point to make fundamental changes to the methods through which carriers may interconnect with each other. Instead, any intercarrier compensation plan should work with the existing system of interconnection architecture, rather than modifying it in ways that may have far reaching and highly detrimental implications for competition.

B. The Commission Should Confirm That ILECs Must Provide Transiting at Cost-Based Rates.

Transit traffic is a fundamental part of an ILEC's interconnection obligation and should be exchanged between carriers under a unified intercarrier compensation scheme. In its comments, XO discussed at length the ILECs' statutory obligation to provide transit services to competitive carriers at cost-based rates through their interconnection arrangements. Moreover, as the Commission noted in the *FNPRM*, "the availability of transit service is increasingly critical to establishing indirect interconnection – a form of interconnection explicitly recognized and supported by the Act. Without the continued availability of transit service, carriers that are indirectly interconnected may have no efficient means by which to route traffic between their respective networks, … [especially where]

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63 (2005) (noting that pricing uncertainty is detrimental to long-term competition).

traffic levels do not justify establishing costly direct connections. "[49] Thus XO urges the Commission here to confirm that its rules will continue to require ILECs to provide transiting services.

XO opposes any proposal to price these services at so-called market-based rates similar to special access services or to potentially subject them to pricing flexibility.[50] The adoption of a market-based approach mistakenly assumes that there is a "market" that will discipline those rates, and here the record indicates that no competitive market exists. As the Commission notes, the ILEC is often the only carrier that is interconnected with all other carriers.[51] CLECs commenting in this docket concur that these services are vital because "transiting obligations ensure that traffic continues to flow across multiple networks and network platforms."[52] XO directly interconnects with a local exchange carrier only if XO exchanges a high volume of traffic with the carrier on a regular basis in multiple markets. XO does use a non-ILEC transit provider where available in some markets, but this accounts for only 5% of XO's total transit traffic nationwide. Otherwise, XO must rely upon the ILEC to transit traffic exchanged with other carriers.

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[49] *Id.* ¶ 125-26. *See* 47 U.S.C § 251(a)(1).

[50] BellSouth Comments at 36; Qwest Comments at 39.

[51] *FNPRM* ¶ 120.

[52] KMC Telecom and Xpedius Communications Comments at 56; *see also* PacWest, et al. Comments at 21; Time Warner Telecom, et al. Comments at 45.

Unless and until third party transit providers become ubiquitous, transiting through the ILEC will be the only feasible method of exchanging traffic with the vast majority of other competing carriers in a region. Moreover, until alternative transit providers are widely available, there should be no consideration of a market-based rates or pricing flexibility for these services. NARUC appropriately recognized this principle and supports price-regulated rates based on a "reasonable return" in non-competitive markets.[53] The transit market simply does not have the characteristics of a competitive market. Until it does, ILECs should be required to provide transit services at TELRIC-based rates.

The Ohio and Texas commissions both advocate that transit traffic be provided through a cost-based rate.[54] Texas, for example, recently completed a review of SBC's obligations and found that, given SBC's ubiquitous network in the state, and record evidence demonstrating the absence of alternative transit providers in Texas, continuing to impose transit obligations on SBC at TELRIC-based rates was necessary to promote interconnection of all telecommunications network.[55] Further, in the absence of alternative transit providers in Texas, the PUC found that SBC's proposal to negotiate transit services separately outside the scope of interconnection negotiations may result in cost-prohibitive rates for transit service.[56]

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53 *NARUC Task Force Study* at 8.

54 Ohio PUC Comments at 28.

55 Texas PUC Comments at 12-13.

56 *Id.* at 15.

While it may be true that at a certain level of traffic, direct interconnection between carriers would be more cost efficient than having the ILEC provide transit service, this does not warrant removal of transit services from the interconnection arena altogether. As the Commission notes, the ILECs "encourage carriers to establish direct interconnection when traffic volumes warrant it."[57] It does not follow, however, that "transiting should be treated as an unregulated service offered at market-based prices, or, alternatively, as special access."[58] Establishing cost-based rates would set the correct price signals and would encourage direct connections when appropriate. When the level of traffic exchanged reaches a point where carriers find it efficient to directly interconnect, they would do so.

IV. THE COMMISSION SHOULD COOPERATE WITH STATE COMMISIONS TO DEVELOP A UNIFIED INTERCARRIER COMPENSATION PLAN THAT MAY INCLUDE COMPENSATION FOR INTRASTATE SWITCHED ACCESS SERVICES

XO agrees that the Commission has clear jurisdiction over interstate services under section 201 and over reciprocal compensation under section 252(d)(2),[59] but XO questions the Commission's authority to preempt state authority over intrastate switched access charges where state commissions have historically had exclusive jurisdiction. The comments bear out the legal risk associated with venturing into the traditional domain of the state public utility commissions. Rather than taking

57 *FNPRM* ¶ 131.

58 *Id.* ¶ 122.

59 *Id.* ¶ 78.

on the states as an adversary, the Commission should work with states to establish a unified system without preempting state decisions.

Understandably, the state commissions believe "it is critical that states continue to have the discretion to develop reciprocal compensation rates that address the unique nature of the traffic and market conditions existing in each state."[60] The South Dakota Public Utilities Commission encourages the Commission to work with the states and adopt a regime that recognizes the states' continuing jurisdiction over intrastate access charges and provides the states with strong, but fair incentives for voluntary participation in a unified intercarrier system.[61]

XO supports referral of the issue of overhauling the intrastate switched access regime to a Federal-State Joint Board pursuant to section 410(c) of the Act[62] or adoption of NARUC's proposal to allow states to voluntarily opt in to the federal regime.[63] The Commission should consider establishing a new joint board to consider means of unifying interstate and intrastate intercarrier compensation rates. XO agrees with the Nebraska Public Utilities Commission that referral to a Joint Board will help ensure that federal and state interests are well balanced and

60 Texas PUC comments at 8.

61 South Dakota PUC Comments at 4.

62 47 U.S.C. § 410(c).

63 *NARUC Task Force Study* at 12.

will ease the transition from the past to the future intercarrier compensation regime.[64]

XO also agrees with NARUC that commenters have not provided sufficient justification for the Commission to haphazardly dismiss the Act's reservation of state rights over intrastate access charges.[65] XO cautions the Commission that any attempt to override historical state authority will likely cause protracted litigation, leading to further regulatory uncertainty.[66] This would not serve the interests of the public or competition.

V. CONCLUSION

For the foregoing reasons, XO respectfully requests that the Commission implement a unified intercarrier compensation mechanism consistent with the principles described above.

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64 Nebraska PSC comments at 10.

65 NARUC Comments at 6-7.

66 *Id.* at 4.

Respectfully submitted,

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